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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

against

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JOHN POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER AND EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

Opinion of the District Court (single judge), denying motion to convene three-judge court and dismissing complaint is reported at 357 F. Supp. 1217 (3a).* Opinion of the Court of Appeals for the Second Circuit reversing the

* Numbers in parentheses refer to Appendix (a) or Appendix to Jurisdictional Statement (J.S. a).

order of the District Court and remanding for the convening of a three-judge court is reported at 480 F. 2d 102 (41a). The opinion and order of the three-judge court denying a preliminary injunction to appellees and also denying a motion to dismiss to appellant is reported at 364 F. Supp. 536 (57a). The opinion of the three-judge court granting judgment for appellee is reported at 403 F. Supp. 931 (J.S. 1a). The opinion of Justice Thurgood Marshall denying stay of District Court judgment. —— U.S. ——, 96 S. Ct. 164 (J.S. 39a).

Jurisdiction

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The judgment appealed from was entered October 9, 1975 (J.S. 14a). Notice of Appeal was filed October 20, 1975 (J.S. 18a). Probable jurisdiction was noted on February 24, 1976 (44 U.S.L.W. 3471).

Questions Presented

1. Does the statutory prescription filing requirement as contained in the Public Health Law (P.H.L.), Art. 33 invade any constitutionally protected right of privacy of the appellees?

2. Did the District Court apply the proper test of constitutionality in using the compelling state interest test or "fundamental right" standard as to the filing statute?

3. In any event under any test was the District Court correct in concluding that New York did not need patient identity on filed Schedule II prescription to achieve a legitimate state purpose?

4. Did the appellees have standing or present a real case or controversy in face of the strict confidentiality provisions in the law?

Statement

The judgment appealed from was entered in two actions seeking declaratory and injunctive relief. They were brought to invalidate a New York statute which requires that all prescriptions for Schedule II drugs, Public Health Law (hereinafter P.H.L.) § 3306 (Schedule II) be prescribed and dispensed only on an official New York State prescription (the "triplicate" prescription), with one copy thereof to be filed with appellant State Commissioner and the Bureau of Controlled Substance, Licensing and Evaluation (BCSLE) in the New York Department of Health. The complaints sought specifically to invalidate P.H.L. §§ 3331(6), 3332(2)(a) and 3333(4), as to any filing required that allowed the appellant to receive a copy of the prescription that disclosed patient identity.

Thus appellees Richard Roe (a fictitious name) *et al.* commenced the action in the United States District Court for the Southern District of New York against the Health Commissioner challenging the requirement for the use of official state prescription forms. The action was filed on March 29, 1973. Appellees George Patient (also a fictitious name) *et al.* commenced a similar action filed April 3, 1973.*

Roe moved for the convening of a three-judge court and for a preliminary injunction. A temporary stay of administrative implementation of the law, in part, was granted. On the return date Patient was allowed to intervene, but the complaint was dismissed as raising no substantial constitutional issue. (357 F. Supp. 1217). The stay of full implementation was dissolved.

Roe and Patient appealed to the Court of Appeals for the Second Circuit. The stay of implementation, in part, was reinstated pending the appeal. The Court of Appeals reversed the dismissal of the complaint and remanded the

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* The Patient plaintiffs intervened; 357 F. Supp. at 1219, n. 5.

action to the district court for the convening of a three-judge court. The stay, or temporary restraining order, as modified, was continued pending the hearing before the District Court (480 F. 2d 102).

On remand, the statutory district court denied both Roe and Patients' motions for a preliminary injunction and the State's motions to dismiss.* (364 F. Supp. 536).

The State filed an answer and extensive discovery ensued. A trial was held on December 2, 1974. Evidence was also received by way of (1) stipulated facts, (2) depositions taken on December 4 and 6, 1974 and (3) exhibits. The district court filed its unanimous opinion on August 13, 1975 (J.S. la). The opinion held "that so much of the New York [Public] Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication by duly licensed physicians is an unconstitutional interference with plaintiffs' rights of privacy guaranteed under the Fourteenth Amendment." (J.S. 13a).

On October 9, 1975, the district court signed an order which contained a stay suggested by the Roe attorneys. The order (1) declared unconstitutional Public Health Law (N.Y. §§ 3331[6], 3332[2][a] and 3333[4]) as they require disclosure of patient identity; (2) enjoined defendant from enforcing the above provisions and accepting such prescriptions or any other document disclosing patient identity for filing and applied this to any other agency of the State (although appellant has no control over them and none were parties); (3) required the State agency to destroy all records within 60 days; and (4) file an affidavit to that effect.

The district court stayed (3) and (4) pending the State's

* The filing statute did not go into full force and effect until the Court of Appeals vacated preliminary injunctions in two similar actions on September 11, 1973, *New York State Physicians Union* v. *Ingraham* (W.D.N.Y. Civil 1973-248, Civil 1973-281). We are aware of no further proceedings therein.

filing an appeal. However, the State Commissioner was required to place all computer tapes and forms in a sealed vault and he could no longer add names to or make any record from the tapes of patient names. As a consequence patient identity from prescriptions is no longer thereby available to the State.

Facts

The plaintiffs-appellees in both actions are anonymous patients and named doctors and doctor's organizations.* The suits were started on the eve of the effective date of Article 33 of the Public Health Law. The challenged portions of the statute required that on or after April 1, 1973, a practitioner (physicians and others) would have to use an official New York state prescription for prescribing Schedule II drugs, a limited list of narcotic and like substances. Pharmacists could only sell such drugs on the official prescriptions, with exception for emergencies (P.H.L. § 3334).

The official prescription is dispensed in triplicate and only on special order to practitioners. It is required to have certain specified information (P.H.L. § 3332) including patient's name, address and age (§ 3332[2][a]). After the drug is dispensed the pharmacist must file a copy with the Department of Health (3333[4]), or if the practitioner self-dispenses, he must file a copy in similar manner (3331[6]).

The purpose of the filing requirement is found in the legislative history. As stated in the Interim Report of the Temporary State Commission to Evaluate the Drug Laws

* These doctor's organizations are not the usual state or county medical societies. The state medical society declined to get involved or support the Roe action (166a). As a consequence the (rather modest) Empire State Physicians Guild, Inc., allowed a drug company Ciba-Geigy (the makers of Ritalin, a widely abused Schedule II drug) to provide the financial backing for the attack on the statute (167a).

(N.Y.S. Legislative Documents [T.S.C.] [1972] No. 10) at p. 21 (and a part of the "Legislative History"):

> "Once the department has received the copies, it will be able to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of schedule II substances, and thefts of prescription blanks and their misuse by unauthorized persons. The information received by the department will show if a patient has obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used. This procedure will also indicate where there has been an over-prescribing or over-dispensing of schedule II drugs. There is a 30-day maximum on the amount of any controlled substances which may be dispensed. Prescriptions for schedule II substances may not be refilled (§ 3339)."

There was no pretense or expectation that multiple prescription and monitoring would solve all problems of drug abuse. Thus at p. 22 of the Interim Report:

> "The Commission has no illusion that the multiple prescription requirement and monitoring of the prescriptions by the department will affect the far more significant problem of street abuse, particularly of the contraband drugs. We do believe, however, that it will be a significant step in reversing the growing trend of diversion and of 'legitimate' abuse of dangerous drugs."

See also the statement of then Governor Rockefeller in approving P.H.L. Art. 33 (McKinney's 1972 Session Laws of New York, Vol. 2, p. 3407):

> "These bills should help reduce the diversion of potentially dangerous drugs from legal medical and research uses into illegal channels. The bills represent a culmination of the efforts of the Temporary

> State Commission to Evaluate the Drug Laws, under the Chairmanship of Assemblyman Chester R. Hardt, to modernize and tighten New York's regulatory controls over the manufacture, distribution and prescription of dangerous drugs throughout the State.
>
> While the bills make an important contribution to stemming the illegal distribution of dangerous drugs, they are admittedly no panacea for curing the drug epidemic destroying the lives of so many of our young people today.
>
> In New York State we have invested over $750 million to fight drug abuse, to treat addicts, to research and apply every promising approach to drug control. But addiction goes on, deaths from overdoses mount, and crimes costing the American people $5 billion a year are committed by addicts to support their habit.
>
> The diversion of legally manufactured drugs to illegal purposes is a contributor to the total drug problem. These measures, designed to stem that insidious diversion, must form part of a total, national response to the drug threat.
>
> The bills are approved."

The expectation was that upon filing the data (including patient identity) from the prescription it would be encoded by means of modern data processing techniques (computers). See Second Interim Report of the T.S.C. April 5, 1971 (also part of the "Legislative History") which reviewed the possible uses of triplicate prescriptions. Also cited were in the operation of similar systems for varying periods in California, Idaho and Illinois.* Noted was their experience and the conviction that "such a program in New York will result in a marked decrease in the abuse of

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* California Health & Safety Code §§ 11158, 11160, 11167; Idaho Code, §§ 37-2722, 37-2730, Ill. S.H. Ann. Ch. 56½, §§ 1308, 1311, 1312(a).

legitimately prescribed drugs'' (p. 21). In other words, triplicate prescriptions and filing can have a prophylactic effect in this area.

As noted in the opinion of the Court (J.S. 2a), the Schedule II drugs, while of some accepted or restricted medical use, also have a high potential for abuse. The monitoring of these drugs by the use of triplicate prescriptions seeks to prevent these drugs from being diverted to illegal uses.

The appellee patients, objecting to the filing of their names on the filed prescriptions, contended the statute was an invasion of their constitutional right of privacy (11a, 17a). The doctors contended that the filing interfered with their constitutional right to practice their profession and prescribe medication or drugs as they saw fit. As such, it was claimed the law infringed on the confidentiality of the doctor-patient relationship.

Basically the appellees speculated that the data collected would be misused, *i.e.*, that they would be labelled ''drug addicts'', that the data would not be confidential, and the like. The actions were begun on or before the complete effective date of the filing requirement, as complete filing and computerization of the prescriptions was delayed until September, 1973 due to various court orders. Thus the above speculation was indeed a complete supposition.

The testimony of the appellees' witnesses is summarized at J.S. 5-6a. The actual operation of the triplicate is only described in the opinion (J.S. 11a) to include the use of patient identity in the printing out lists of patients obtaining more than a 30-day supply of Schedule II drugs or going from doctor-to-doctor to obtain Schedule II drugs.* Actually other uses were testified to (specific inquiries from the field) (423a). Even as to that specific purpose, the cited

* No plaintiff patient testified he would be on the print-out, nor did any doctor testify he would be on the print-out.

single instance (11a) has been joined in the months following trial by dozens of suspect situations revealed by increased scrutiny of print-outs. Obviously this could not be reflected in the record.*

Based on this supposed lack of *results*, the Court below concluded that the State did not *need* patient identity on the filed prescriptions and enjoined the filing or processing of prescription forms containing patient identity.** The order signed permanently prevented any use of patient identity to better enforce Article 33 of the P.H.L. A limited stay allowed the appellant to keep previously processed prescriptions but not make any use of them.

Summary of Argument

(1) The sections of the Public Health Law of New York which require filing with the state official of a prescription copy including patient identity are an exercise of the police power over distribution of dangerous drugs. They do not attempt to control or regulate the individual or his medical treatment. Filing is carefully designed to prevent abuse by diversion of the specified narcotic and amphetamine type drugs from legitimate medical use. Thus the regulation requiring doctors and phramacists to file the Schedule II prescription copy does not infringe on any right of privacy as it has developed in our jurisprudence. This right revolves around an individual's choice, not a relationship with a professional.

* In the September 1975 print-out, the last before the judgment appealed from brought use of the filed prescriptions to an effective halt, 45 reports were made (in one month). These involved patients using the same name to obtain controlled drugs (Schedule II) from multiple sources (doctor-to-doctor). Included also were prescribing over a 30-day supply of a drug and use of forged or stolen prescriptions.

** The opinion held it was ''unnecessary'' to evaluate confidentiality requirements (J.S. 13a).

With the filing of prescriptions there is no personal right involved which this Court has deemed fundamental or implicit in the Constitution. Rather the statute can only be said to affect total anonymity. Yet the latter never exists, having been lost at birth, and at many stages of life it is necessary to reveal one's identity to public officials. Given the State's undoubted interest in the regulation and control of drugs of all kinds, the State has the power to supervise prescription of dangerous drugs.

The physician-patient relationship is not a relationship invoking a fundamental right of privacy as we know it. Cases such as *Roe* v. *Wade,* 410 U.S. 113, and *Doe* v. *Bolton,* 410 U.S. 179, find a right of privacy and protect the woman's right to choose an abortion. They do not protect the doctor-patient relationship. While this right may be asserted in a medical context, the doctor's presence is not what makes a fundamental right.

There are important reasons not to find a fundamental right of privacy in the doctor-patient relationship. Basically it would severely limit the ability of states to mold the doctor-patient testimonial privilege to fit the needs of the public, mandate its creation and put in jeopardy the common reporting statutes whereby doctors report certain conditions to public officials.

(2) It was improper to apply a fundamental interest test to the statutes involved. The statutes need only be rational and serve the State's legitimate interest. The "need" for the statutes cannot be based on the court below's analysis of the results. This is a matter for the legislature, something within the judgment of it, not the courts.

For the courts to test constitutionality as was done below, would be a revival of substantive due process (*Lochner* v. *New York,* 198 U.S. 45) in a manner which gives courts *carte blanche* to strike down laws which seem to the courts unwise or unproductive.

Clearly, only a rational basis is needed for a law regulating the sale of drugs, an area traditionally and firmly within the State's police power. But even if the compelling interest test is applied, the State's interest in the abuse of the prescriptiton of and the use of the dangerous drugs is so compelling as to fully support the provisions of the statute.

(3) Filing patient's names with the prescription serves a sufficient purpose. It is clear filing (and computerization) can disclose multiple sources of prescriptions (doctor-shopping), excessive prescriptions, and forgeries. The necessary follow-ups by investigators is assisted by patient identity. Not having such identity seriously interferes with the efficient operation of the program. The State, given its limited resources, cannot accomplish what it seeks if the filed prescriptions lack patient identity.

The possible uses of the prescriptions are varied and do not depend on whether at the time of trial they were not yet being so used.

(4) By providing for confidentiality of patient identity, P.H.L. § 3371 prevents any invasion of privacy. The statute, on its face, does so and such confidentiality provisions have been recognized as defeating a claim that privacy is invaded by a filing or medical review program.

The program herein will only use data and patient identity for purposes consistent with the program. Filing of prescriptions in no way stigmatizes the patient.

(5) The patients and doctors presented a claim based on fear and conjectures which had no basis in the filing law as written or administered. The court below gave standing or found a real case on a string of conjectures or hypotheses. The issues in this case was not privacy, but whether erroneous "feelings" can lead to finding unconstitutional a legitimate exercise of the police power. This is simply "ingeneous pleading", not stating a real case or controversy.

I. The challenged statutes are within the State's unquestioned authority to regulate drug abuse.

Article 33 is concerned with the pervasive problem of drug abuse. The statutes here challenged are directed solely at the control of substances which are extremely dangerous, potentially resulting in "severe psychological or physical dependence", *Roe* v. *Ingraham*, 480 F. 2d 102 (2d Cir. 1973). The appellees contest neither the tremendous scope of New York's drug problem nor the obviously legitimate necessity of complete state regulation of dangerous drugs. Recognizing the State's legitimate interest in regulating dangerous drugs, *Roe* v. *Ingraham*, 403 F. Supp. 931, the judgment appealed from nevertheless precludes any effective regulation.

The challenged provisions are carefully designed to further legitimate and important state interests in controlling the dangerous drugs and preventing their diversion into the illegal market. The State is also concerned with the growing trend of careless or unnecessary prescription and over-prescription. The statutes are intended to regulate the use of dangerous drugs in the expectation of controlling and deterring drug abuse. The filing requirements of the state statutes are carefully designed to achieve the purposes of the statute. While allowing the physician or practitioner complete freedom to treat his patient as he sees fit, the statute endeavors to control the unfortunate fall-out of current practices.*

There is no question that the state has an almost absolute right to control the sale, prescription, and use of danger-

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* As an example, see *United States* v. *Warren*, 453 F. 2d 738 (2d Cir. 1971), cert. den. 406 U.S. 944. The Court of Appeals for the Second Circuit in affirming the District Court, held in *Warren* "that the offense, involving serious danger to the physical and mental health of many hundreds of unsuspecting people, was a particularly callous example of the increasingly severe problem of drug abuse", *id.* at 744.

ous drugs. In the now vintage ruling in *Whipple* v. *Martinson*, 256 U.S. 41, 45, this Court said:

> "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be sucessfully called in question."

This was repeated with approval in *Robinson* v. *California*, 370 U.S. 660, 664. Also "[s]uch regulation, it can be assumed, could take a variety of forms." The wisdom of any particular choice within the wide spectrum of possibilities is not for the courts to decide.

State courts have forcefully reiterated government's authority to regulate dangerous drugs under the police power. In New York, "[t]he Legislature has undoubted power to regulate the manufacture or sale of drugs, including proprietary medicines, in respects which are related to public health." *Loblaw, Inc.* v. *N.Y.S. Bd. of Pharmacy*, 11 N Y 2d 102, 111, 226 N.Y.S. 2d 681, 687 (1962). And *Brodsky* v. *Cal. State Bd. of Pharmacy*, 173 Cal. App. 2d 680, 344 P. 2d 68, 74 (1959), asserted, "[t]he business of compounding prescription and selling drugs is intimately connected with and has a vital relationship to the health, safety and welfare of the public. Public safety must be regarded as superior to private rights." See also *State* v. *Braun*, 209 Kan. 181, 495 P. 2d 1000, 1004-1005 (1972), *cert. den.* 409 U.S. 991.

The challenged statutes are solely designed to protect the public through regulating the prescription of dangerous drugs. The requirement of filing an official prescription with the name and address of the patient using the dangerous drug is within the reasonable exercise of the State's

police power. The "requirements are an essential means of gathering the data necessary" to achieve the statutory purpose (*Buckley* v. *Valeo*, —— U.S. ——, 46 L.Ed.2d 659, 711, 715 [1976]), and should have been upheld.

II. There has been no infringement on any right of privacy.

The opinion below is premised on the erroneous assumption that merely requiring the filing of an individual's name and address is a violation of the right to privacy and that the physician-patient relationship is a constitutionally fundamental relationship that requires meeting a compelling state interest standard. An examination of the developing right of privacy indicates that the lower court's approach is a radical departure from the limitations set by this Court.

The challenged statute in no way prohibits or regulates human behavior such as marital privacy, *Griswold* v. *Connecticut*, 381 U.S. 479, or the use of contraceptive devices; *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). Unlike *Griswold* and *Eisenstadt*, the New York statutes do not absolutely prohibit, much less interfere with an individual's determination as regards treatment. It merely regulates the distribution of certain dangerous drugs.

There is no added burden or interference placed upon the patient to secure the prescribed drug. As before, the decision whether or not to prescribe the drug is left entirely to the doctor. Although appellees may claim a psychological effect of the filing requirement on some patients who are not objectively and fully informed or who are wrongly counselled, certainly this potential effect, besides not being established upon the record, would have to be hypothetical and minimal.*

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* It has been held that such "fear" does not even support a cause of action. *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972).

Reliance upon the right of privacy referred to in *Roe* v. *Wade*, 410 U.S. 113 and *Doe* v. *Bolton*, 410 U.S. 179, is misplaced. The Texas statute in *Roe* absolutely prohibited abortion except as necessary to save the mother's life. The Georgia statute in *Doe* directly prohibited abortion in most circumstances and imposed certain procedure conditions *before* the abortion which had the effect of prohibiting abortions in situations where otherwise allowed. To compare the serious impact of the facts in those cases with the filing requirement here and its hypothetical effect is like comparing apples to oranges. There is no relationship.

In *Roe*, this Court refrained from giving "privacy" the status of a fundamental right. In citing a series of decisions, the Court noted that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy", *Roe* v. *Wade*, *supra*, at 152. The personal right this Court identified in *Roe* and *Doe* is the woman's right to terminate pregnancy. The Court explicitly rejected the theory that a woman had an absolute privacy right to terminate her pregnancy at will, *Roe*, *supra*, at 153. Instead the Court found that "a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life," *Roe* at 154.

There is no support in *Roe* v. *Wade*, *supra* or *Doe* v. *Bolton*, *supra*, as cited by the Court below (J.S. 18a), for the expansive concept that there is a fundamental right to privacy in the simple doctor-patient relation, regardless of the context or setting. Nothing in either *Roe* or *Doe* even suggests that the doctor-patient relationship is fundamental. Although the decisions state that the decision of a woman to have an abortion should be made in consultation with a doctor (*Doe*, *id.* at 191-192, *Roe*, *id.* at 163), it is the

woman's right to make *the decision to have an abortion* which is the fundamental privacy right protected by *Roe, id.* at 153. It was not the doctor-patient relationship which made the decision to have an abortion a part of the fundamental privacy right. In reality, only the actual interference with *the decision to have or perform the abortion* as in *Doe* (committee review of abortions) limited the right to an abortion.

On the other hand no case can claim a fundamental right to receive dangeorus drugs. The court below concedes this state interest (J.S. 11a).

To assert that *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 66, n. 13 (1973) "reaffirmed the holding in *Roe* and *Doe* that privacy embraced the doctor-patient relationship" as in the decision below (J.S. 9a) is unsound. In *Slaton,* this Court noted (fn. 13):

> ". . . the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved . . ."

While the court below relied on this language, it is clear that this Court distinguished between constitutionally protected relationships (of privacy) and the possible places in which the right to privacy in *those relationships* are asserted. Only if such a relationship already existed, would the "doctor's office" get involved. The *Slaton* decision (fn. 13) did not say that the doctor-patient relationship was constitutionally protected, nor did it purport to grant constitutional protection to any of the mentioned places.

The private nature of a transaction (and sale of drugs, even via prescriptions, is still a commercial transaction)

does not invoke a right of privacy. See *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123, 127-128 (1973), involving importation of obscene materials for private use. As said therein by way of analogy (128):

> "To allow such a claim would be not unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public sale or distribution".

And further the Court noted, at 129, once obscene material is in the country, it is extremely difficult to control the use to which it is put.

There are several important policy reasons against holding that the doctor-patient relationship is a fundamental interest. (1) The holding below might mandate creation of a doctor-patient testimonial privilege in states that do not have one; (2) the holding below would limit state variations on the privilege; and (3) the holding below would put in jeopardy numerous salutary state statutes requiring doctors to report certain types of case to state authorities (child abuse, venereal disease, bullet wounds, drug addict). See generally, 50 N.Y.U. Law Rev. 1149, 1159-1160, *The Right to Privacy.**

Finally, to the extent that the challenged statutes concern the physician patient-relationship, it is self-evident that there is no substantial encroachment on that relationship. No restraint is placed upon the physician's bona fide prescription of schedule II drugs. The doctor's medical decision as to how to treat his patient best is unhampered. Similarly, there is absolutely no restriction on a patient's

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* This Note criticizes the use of a compelling or fundamental interest test herein and suggests something called "middle level scrutiny" *ibid.* at 1161. It is submitted that there is no such level. Either the interest is "fundamental" or not. If not, a *rational* basis is the test. *infra,* III.

medically supervised use of a schedule II drug. Even before the statute was enacted, the identity of the patient was subject to disclosure. Furthermore, the confidentiality provisions of the statute prohibit unauthorized disclosure (§ 3371) thereby effectively removing any rational fear of stigmatization. The only effect on the physician-patient relationship is to have the doctor use an official prescription blank.

Here there is no personal right which can be deemed fundamental or constitutionally implicit. The only asserted encroachment by the challenged statutes is to the dubious right of total anonymity. (Thus at J.S. 12a the District Court held that the dispersal of records as a value to be protected.) To hold that such anonymity is within the scope of the right of privacy, much less a fundamental personal right, is a radical departure from commonly accepted standards. Anonymity is lost at birth with the filing of birth certificates. The filing of death certificates deny anonymity even in death. To exercise the right to work requires giving up anonymity by registering with the Social Security Administration. To receive income, earned or unearned, involves the payment of taxes, again destroying anonymity. Even the fundamental right of voting requires giving up anonymity by registering or contributing *Buckley* v. *Valeo,* —— U.S. ——, 46 L.Ed. 2d 659, *supra.* Anonymity is also lost because of fingerprinting requirements in certain jobs. *Thom* v. *New York Stock Exchange,* 306 F. Supp. 1002 (S.D.N.Y. 1969), affirmed 425 F. 2d 1074 (2d Cir.), cert. den. 398 U.S. 905.

To contend that supposed right of anonymity is strengthened by the context of taking drugs to insure medical health is a frivolous and bootstrap argument. The absolute power of the State to regulate the use prescription and sale of dangerous drugs has already been shown, *Whipple* v. *Martinson, supra,* 256 U.S. 41, 45. No violation of constitutional rights is involved in the inspection

of a physician's narcotic or drug records. *Anderson* v. *Reynolds,* 342 F. Supp. 101, 111 (D. Utah, 1972). The license to practice medicine is not a license to distribute drugs. *Brown* v. *United States,* 250 F. 2d 745 (5th Cir.), *cert. den.* 356 U.S. 938. The State may supervise drug transactions between physicians and patients, particularly as a control against drug abuse and diversion. The argument of appellees is more frivolous since the State has not even requested the purpose for which the drug is being prescribed. Furthermore, the statute's confidentiality provisions assure the individual's privacy (preservation of personal autonomy) by safeguarding the use of patient identity (V, *infra*).

Other cases where this Court has explored the scope of right of privacy emphasize that the case at bar is beyond the parameters of the right of privacy. For instance, in *Kelley* v. *Johnson,* —— U.S. ——, 44 L.W. 4469 (April 5, 1976), this Court recently held that the right of a policeman to wear his hair a certain length is not within any right of privacy. In this area of public safety, *i.e.,* the State's police power, the test is not whether the State can "establish" a "genuine public need" (4472) for a specific regulation as the Second Circuit held (508 F. 2d 836, see *Dwen* v. *Barry,* 483 F. 2d 1126, 1130-1131). Rather it is a rational connection between the regulation and the promotion of safety. Further the courts are not in a position to weigh policy considerations for or against a regulation. A traditional rational basis test, *Williamson* v. *Lee Optical,* 348 U.S. 483, 487-488 (1955), was applied in *Kelley* (*infra,* III).

Even in a clear patient-doctor case, this Court affirmed the dismissal of the complaint in *Association of American Physicians and Surgeons* v. *Weinberger,* 395 F. Supp. 125 (N.D. Ill. 1975), affd. *sub nom. Association of A. P & S* v. *Mathews,* —— U.S. ——, 46 L. Ed 2d 299, 96 S. Ct. 388. The case clearly indicates that official review of a physi-

cian's practice does not interfere with any constitutional right to practice medicine or invade the privacy of patients. The *Weinberger* case, 395 F. Supp., at 135, cites the confidentiality provision, 42 U.S.C. § 1320a-15, to negate any invasion of privacy.

This Court has also had occasion to explore privacy within the context of disclosing confidential reports and records. Thus in *Fisher* v. *United States,* —— U.S. ——, 44 L.W. 4514 (April 21, 1975), this Court held that tax records of a client were not immune from productions when in the possession of his attorney. The Court examined the purpose of the attorney-client relationship, 4518, and found it did not encompass papers in the hands of an attorney. The privilege is to encourage a client to make full disclosure to his attorney. By analogy the information on the prescription (drug, dosage, name, address), which is available to appellant in any event, is not the type of disclosure necessary for the patient to obtain medical treatment—the purpose of the medical privilege. By filing the prescription the appellant learns nothing about the underlying illness or malady.

And in a sequel to *California Bankers Assn.* v. *Schultz,* 416 U.S. 21, this Court held in *United States* v. *Miller,* —— U.S. ——, 44 L.W. 4528 (April 21, 1976), that bank records kept by virtue of the Bank Secrecy Act record-keeping requirements are not protected by some right of privacy. The records are not the "private papers" of depositor. By way of analogy, the prescriptions herein are not the "private papers" of appellees. They are business records permitting the sale of controlled drugs. While the records in *Miller* were subpoenaed, the lack of a subpoena for the appellant to have access to the prescription is no objection to the filing process. *United States* v. *Biswell,* 406 U.S. 311 (1972) upheld access by government agents to gun records, where the business (guns) is prevasively regulated the persons engaged in same does so with knowledge that the records will be subject to effective inspection (316). There is no doubt prescribing and sale of dangerous or controlled drugs is closely regulated and licensed.

Pertinent also is this Court's ruling in a case involving a similar federal drug control statute requiring official prescriptions open to official inspection where this Court found no constitutional problem. *Minor* v. *United States,* 396 U.S. 87. There the same type of official prescription in triplicate, 26 U.S.C. § 4742(a), was described, *id.* at 90. Failure to use this form was upheld against a claim of self-incrimination. If this type of procedure is unobjectionable in face of a clearly defined constitutional right, then it stands against some undefined right of privacy. (It should be noted that the above federal law has been repealed and replaced by the comprehensive Drug Abuse Law in 21 U.S.C. § 801 *et seq.*)

From the foregoing, it is evident that the filing requirement of P.H.L. §§ 3331(6), 3332(2)(a) and 3333(4) does not violate the right of privacy as that doctrine has been as yet developed by this Court.

III. The Court below improperly applied a fundamental interest test. It should have applied a rational basis analysis. In any event the legislation meets the test imposed by the Court.

As we have demonstrated the privacy right allegedly affected by the challenged statutes do not involve a fundamental right. Similarly, fundamental status cannot be achieved in the guise of the doctor-patient relationship. Therefore, the challenged statutes, like any exercise of the state's police power must be measured by a standard of reasonableness. Where the public safety is involved, the State need not use only such means that satisfy some court's judgment as to proper breadth of regulation as when the First Amendment is involved, *Erznoznik* v. *City*

of Jacksonville, —— U.S. ——, 45 L. Ed. 2d 125 (1975), and cases cited below (J.S. 11a). Obviously the statute in question does not involve infringement of the First Amendment and appellees do not so claim.

Thus the discussion of "needlessly broad sweep" (J.S. 11a) is off the mark. Given the concession by the district court that the state effort to control drug abuse was legitimate (J.S. 11a), and the proposition, and as advanced in II, *supra,* that we are not dealing with a constitutionally protected right (to privacy, First Amendment, or intimate familial or sexual relation), the test to be applied is whether the statute with the filing and computerization is rationally connected to the statute's purpose. While the rational basis test, *McGowan* v. *Maryland,* 366 U.S. 420, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, is normally applied to a claim of denial of equal protection, it can be applied to a claim of denial of due process (or right of privacy), as in *Kelley* v. *Johnson, supra.* Even the District Court herein had to concede at a minimum that filing of the prescription including patient identity had merit and was essential to ferreting out instances of over-prescription and multiple sources (doctor-to-doctor) (J.S. 11a).

There is simply no authority for the proposition, as advanced and used by the District Court (J.S. 11a), that the administrative yield or results of a program would be the test of constitutionality. If it were, the constitutionality of a filing requirement would be dependent on the level of administrative efficiency of the State's administration of the program. Thus the identical prescription filing statute would be constitutional in Idaho, for example, if the yield satisfied some federal judge there that the effort was worth it. Based on the District Court's pragmatic evaluation of a legitimate state effort, the program would be approved or invalidated as the case may be. Clearly if the effort herein was not justified by the results, this is a matter for the legislature, not the Courts.

Obviously the legislature, after some study (J.S. 2a) determined there was a need for use of triplicate prescriptions for the dispensing of dangerous drugs together with filing with the State agency charged with the enforcement of the law. Computerization of filed prescriptions was contemplated as assisting in the efficient enforcement of the law.* Whether filing will ultimately achieve all the aims envisioned by the legislature is not the issue. Whether these hopes are achieved in the end does not affect the law's constitutionality. As said in *James* v. *Strange,* 407 U.S. 128; 133-134:

> "We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated.' *Roth* v. *United States,* 354 U. S. 476, 501 (1957) (separate opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. It has been noted both in the briefs and at argument that only $17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended. Our task, however, is not to weigh this statute's effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch."

And in *Mourning* v. *Family Publication Service, Inc.,* 411 U.S. 356, 378:

> "It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils

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* Efficiency in the achievement of a legitimate State purpose is not unconstitutional. *Rosario* v. *Rockefeller,* 410 U.S. 752, 762, ftn. 10. This so, even where fundamental rights such as voting are involved.

sought to be remedied could better have been regulated in some other manner."

' The question of the power of the legislature is not to be confused with the entire range of legislative considerations when dealing with a matter of policy. The three-judge court herein could not indulge in a legislative judgment. Yet it did and this was erroneous. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago & R.I. & P. Rd. Co.*, 393 U.S. 129, 136; see also *Cohen* v. *Beneficial Finance Corp.*, 337 U.S. 541, 548-549.

In actuality, the district court has resuscitated erroneously the theory of substantive due process. See 48 N.Y.U. Law Rev. 670, 773 (1973) *Note: On Privacy.* The instant decision does not protect any identifiable personal liberty of appellees but rather interferes with a firmly established state right which was recognized some fifty years ago in *Whipple* v. *Martinson, supra.*

In spite of the district court's conclusion that the State is interfering with the practice of medicine, the statutes at issue are simply regulating the process of prescribing a limited area of drugs, Schedule II dangerous drugs. *Roe* v. *Ingraham, supra,* 357 F. Supp., at 1221. Obviously the statutes do not prevent the patient from disclosing his problem to the doctor. In contrast to *Roe* and *Doe,* where the woman's choice to have an abortion was protected, the decision to prescribe a certain drug is solely the doctor's. The patient does not choose the specific drug to treat his ailment.

Given the situation that New York has a right to regulate the business of dispensing drugs, the procedural process should only be subject to a test of "reasonableness".* *McGinnis* v. *Royster,* 410 U.S. 263, 270. The de-

* New York recognized, by providing for confidentiality of patient identity, P.H.L. § 3371 that it was dealing with a sensitive area.

termination that filing with patient identity would serve a useful function in controlling drug abuse and diversion require only some rational basis. The regulation further some legitimate, articulated State purpose, *McGinnis,* at 270; *Roe* v. *Ingraham,* 357 F. Supp. at 1220-1221. And contrary to the decision below this Court in *McGinnis, id.* at 271, would "pass no judgment on the success or merits of the State's efforts . . .".

The only justification for application of strict judicial scrutiny is when some fundamental right is being infringed. *Doe* v. *Bolton, supra* (abortion); *Harman* v. *Forssenius,* 380 U.S. 528 (1965) (voting).

If the appellees argue for something called "middle-level scrutiny", see 50 N.Y.U. Law Rev., *supra* at 1161, the answer is simple. It does not exist. Any argument for it does not find support in decisions of this Court. Whether, the classification, *in fact,* advanced a legitimate State end, *On Privacy,* 48 N.Y.U. Law Rev., *supra* at 703, is simply another statement of the rational basis analysis. *Population Services Int'l.* v. *Wilson,* 398 F. Supp. 321 (S.D.N.Y. 1975), app. pdg. 44 U.S.L.W. 3162 (Sept. 20, 1975), cited by 50 N.Y.U. Law Rev. *supra,* as middle level, depended on *carefully scrutinizing* the statutory provision. This was treating the right (to contraceptives) as fundamental. It cited *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973).* However *Boraas* was not reversed on other grounds, 416 U.S. 1 (1974). Specifically this Court said at 416 U.S. 8, that *Boraas* did not involve "fundamental" right, or privacy and thus only a "rational relationship to a [permissible] state objective" citing *Reed* v. *Reed,* 404 U.S. 71 (1971), was the proper test. Clearly this Court has not found a third test. The filing of prescriptions will,

* It is interesting that the initial decision herein, 357 F. Supp. 1217, 1221 also cited *Borass* and found the filing statute in issue met the test.

in fact, advance the State's objective if it is given a chance to operate. Its very existence deters drug abuse via the prescription route and does not depend on the efficiency of appellant's computer.

IV. The requirement of filing patient names on prescriptions is a rational exercise of New York's police powers and serves a sufficient purpose.

We have already in I, *supra,* explored the power of a state over the use and distribution of drugs, and especially dangerous ones. See *Whipple* v. *Martinson, supra.* A requirement that a practitioner report, on a regular basis, the names of "drug-dependent" persons invades no right and privacy and is within the State's power. *Felber* v. *Foote,* 321 F. Supp. 85 (D. Conn. three-judge court 1970). *Felber,* at 88, relied on *Katz* v. *United States,* 389 U.S. 347, 350-351 (1967) which stated:

> "But the protection of a person's *general* right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left largely to the law of the individual States." (ftn. omitted).

While the appellees will undoubtedly talk about the State "conceding" (Appellee Roe's Motion to Affirm, p. 25) and the Court's findings, the requirement of filing need not be considered on a limited or constricted basis if it rationally advances New York's purpose to control and, hopefully, eliminate or reduce the abuse of dangerous but medically useful prescription drugs.*

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* Often drugs, such as in Schedule II, have been subject to strict prohibitions with even scientific experimentation limited. See, 73 Col. L. Rev. 372, Book Review of "Dealing with Drug Abuse" (Feb. 1973).

By focusing simply on the one regular computer print-out that would contain patient identity, the district court erroneously concluded that the filing of the triplicate prescriptions was not necessary or added nothing to the State's efforts. This is an utter fallacy which on even cursory analysis does not stand up. Even the Court's "Findings of Fact" stated the use as "thus far" (J.S. 5a). It did not preclude other uses.

In talking of one or two instances (J.S. 5a, 11a) of doctor shopping or overprescription referred by the computer, the district court necessarily had to hold that computerization was the only reason for filing. While probably the major rationale, the courts cannot pick and choose what aims of legislation are primary and which subordinate. *McGinnis* v. *Royster,* 410 U.S., at 276, *supra.* Even if computerization of the filed prescriptions was never attempted and no print-out ever made,* the prophylactic effect of filing Schedule II prescriptions is rational and obvious. Knowledge of filing would have the rational result of reducing drastically the over-prescription of Schedule II drugs. Bogus patients and unscrupulous doctors would hopefully cease their activities.** Indeed if the district court presented a proper picture of the results from use of computerization, it would be a proper conclusion that the filing system had virtually eliminated the abuse it was directed to.*** As stated in the *T.S.C.,*

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* Actually 24 referral were made by computer analysis using patient identity from April 29, 1974 to February 28, 1975. Some revealed forgeries. Three resulted in criminal action or arrest, one in civil action and as of now 12 are still pending.

** Filing enables the appellant to more quickly uncover and locate bogus and sham prescriptions which are not confidential anyway. *Kaplan* v. *Kaplan,* 31 NY 2d 63, 67, 286 N.E. 2d 260 (1972).

*** Unfortunately, this is not the case. In the September, 1975 print-out there were 45 instances or referrals of over-prescription

(*footnote continued on following page*)

supra, the program reduces abuse of legitimately prescribed drugs.

The district court attempted to buttress its conclusion that the filing requirement was of no use by alluding to in a footnote (J.S. 11a), that (1) the prescriptions will be of no aid in preventing addicts from getting drugs by prescription (2) besides they would not use their own name or the same name and (3) the plaintiffs doctors testified they would spot addicts. The above rationales are totally fallacious. (1) the law, P.H.L. § 3380 prohibits the prescribing, administering or dispensing of "controlled substances" (Schedule II drugs) to addicts or habitual users except for research, §§ 3324 *et seq.* (Title III of Article 33 of P.H.L.) and under specific situations covered in Title V, §§ 3351 *et seq.* (2) The court assumes that addicts will violate another prohibition, P.H.L. § 3397, by obtaining the Schedule II drugs (by fraud and deceit). A law cannot be assumed to be unnecessary because some people may violate it. (3) Maybe the appellee doctors are so "expert" that they can spot addicts who come into their offices. However, the T.S.C. (Interim Report, p. 21) noted that many physicians felt that some "inhibition on over-prescribing was long overdue, and that the medical profession had demonstrated a clear inability to police itself in this regard."* The testimony of the appellees also flies in the face of the well-documented fact that there are doctors who are not interested in using these dangerous drugs properly

(*footnote continued from preceding page*)

and/or multiple sources (doctor-to-doctor shopping). Unfortunately due to the injunction below no follow-up action could be taken. Several of these items included use of stolen and/or forged prescriptions.

* The federal Drug Enforcement Administration (Registrant Facts, Vol. II, #3, September 1975) has asked physicians to make special efforts as to amphetamines to insure that multiple prescription orders are not being obtained by a patient from different physicians.

but simply sell drugs. For instance, see *United States* v. *Warren, supra,* 453 F. 2d 738 (2d Cir.). And some "medical" sources are so well known as to be the subject of newspaper articles (New York Times, Dec. 4, 1972, p. 1, re: Dr. Max Jacobson, and Mar. 25, 1973. "Two Doctors Here Known as Sources of Amphetamines").

The district court attempted to say that the State could ferret out over-prescribing and forgeries without use of patient identity. Concededly, there was no way of simply locating persons using multiple sources without filing. The 24 Bureau of Narcotic Control investigators (J.S. 4a, 5a) cannot go over 100,000 prescriptions without some mechanical assistance.* The decision ignores the illicit prescribing of drugs for over 30-days. Presently there is a print-out with this but without patient names. Thus investigators have to go out physically to pharmacies to obtain the names of patients. The additional step obviously interferes with the State's efforts. Furthermore to conclude that patient identity adds nothing to investigating forgeries and stolen prescriptions is also fallacious. Obviously the computer cannot know a name is a forgery. However, lost, stolen and forged prescriptions are required to be reported. From this the appellant (BCSLE) prepares a regular list of same (like the credit-card companies do) and distributes it to pharmacies. If a person comes in to a pharmacy with one of these prescriptions, the use same may be stopped, or hopefully apprehend the forger. For example, the BNC may be called. Even so, the stolen, etc., prescriptions are often used by one person which can only be detected by use of patient identity (BCSLE had a computer-referral case

* Many of the 45 referrals in September 1975 involved a person obtaining prescription from multiple sources and cashing the prescriptions in several pharmacies, the only place BNC investigators can now obtain the identity of patients.

involving an "E.K." in Long Beach, N.Y. with three different doctors and two pharmacies). Without patient identity the appellant cannot properly investigate these matters. Indeed such information is necessary to verify the correctness of the filed prescription, if it is in question.*

Other uses, although not contemplated by the District Court, or perhaps even appellant, are the use of patient identity in criminal investigations. The statute, P.H.L. § 3371(1)(b) clearly contemplated that on *court order* the patient's identity would serve a useful purpose in criminal investigations. An example is a court order obtained by the Westchester County District Attorney in the investigation of the death of a doctor from morphine intoxication. In seeking the possible source of the morphine, the printouts of the deceased doctor, his wife (also a doctor) and his patients were requested. However without patient identity servicing of such legitimate court orders (P.H.L. § 3371 [1][b]) is impossible.

Finally, the statute contemplated use of prescriptions containing patient identity in professional disciplinary proceedings. P.H.L. § 3371(2). Without patient identity, prompt action against unethical doctors is impeded. The filed prescription may be the only evidence of a doctor's abuse of his patient.

The District Court's contention that patient identity adds nothing is simply an expression of judicial Luddism.**

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* Prescriptions have been written in the name of a professional sports team ("Buffalo Bills") and not the individual patient. Here this is spotted before the prescription is even processed for the computer.

** So called after the band of workmen (1811-16) who tried to prevent the use of labor-saving machinery by breaking it, burning factories, etc. (Webster's New Int. Dictionary 2nd Ed.)

The use of filing allows instant retrieval via computerization but what the district court condemned (J.S. 12a) was paradoxically accepted in the single-judge opinion, as one of the "facts of present day life." (357 F. Supp., at 1222.) No one need be insensitive to the dangers posed by modern computer technology. However where the system has a properly defined purpose with strict provisions to prevent misuse of the data, it is not the function of the courts to destroy the operation based on vague, unarticulated "fears" having no rational support or relation to the law or the appellant's operation.

We do not believe that it was in any way proper to test the constitutionality of filing on the basis of "results". The test in making reports should be "a high degree of usefulness in . . . investigations or proceedings". See *California Bankers Ass'n.* v. *Schultz*, 416 U.S. 21, 26, *supra*. Patient identity at the very least, is highly useful to the Department of Health fulfilling its obligations.

Reporting of certain transactions has such a long-standing history as not really to be in issue. Thus the Internal Revenue Service obtains information on all kinds of payments, 26 U.S.C. § 6031 *et seq.* reports on W-2 forms and interest income statement (Form 1199), 26 U.S.C. § 6049 (1). These, we presume, are computerized to compare with filed income tax returns. In New York, attorneys in the First, Second and Fourth Judicial Departments must file retainer statements and closing statements (including client's names) on contingent fee cases; 22 N.Y.C.R.R. §§ 6037, 691.20, 1022.2, 3. Some challenge was made and rejected, although not on privacy grounds. *Gair* v. *Peck*, 6 N Y 2d 97, 160 N.E.2d 43 (1959), app. dsmd. 361 U.S. 374.

V. Confidentiality is insured by the statute, preventing any possible infringement of any asserted right of privacy.

The opinion of the three-judge court expressed concern that the reporting requirements of the challenged statutes would involve "broadcast to unauthorized sources" (J.S. 10a) and the consequential stigmatization of persons making beneficial medical use of Schedule II drugs (403 F. Supp. 931). This concern is ill-founded because it fails to consider the statutory requirements of confidentiality, the purpose and operation of the filing requirements and attaches an inappropriately sacrosanct status to the doctor-patient relationship. There is no record evidence to support the contention.

A. The statute, on its face, insures confidentiality

The challenged sections of the Public Health Law [§§ 3331(6); 3332(2)(a) and 3333(4)] merely require the filing of the patient's name and address on a special prescription form (29a). This differs from the prior, and presumptively constitutional, law only by the requirement of central filing with the Department (*Roe* v. *Ingraham, supra,* 480 F. 2d at 108). In his opinion for the Court of Appeals, reversing the dismissal of the action and ordering a three-judge court, Judge Friendly emphasized that the ambiguity of New York Public Health Law § 3371 would make it potentially ineffective in guaranteeing the confidentiality intended by the statute. Partially in response to Judge Friendly's opinion, the New York Legislature amended Public Health Law § 3371 to better insure the confidentiality of the records by more specifically identifying the persons who may have access to the records and for what limited purposes. Furthermore, the legislature amended Section 3370 by providing that all records

of the name of any patient received pursuant to the filing sections herein challenged must be destroyed within five years of receipt.

It is fundamental that in reviewing the constitutionality of any statute, all statutory qualifications on the operation of the challenged statute must also be considered. *Kokoska* v. *Belford,* 417 U.S. 642, 650, citing *Brown* v. *Duchesne,* 19 How. (60 U.S.) 183, 194. It may be inferred (from an utter lack of discussion) that the three-judge court failed to consider the effect of Sections 3370 and 3371 in qualifying the challenged sections of Article 33. On its face the statute guarantees the individual's right of privacy by providing strict limitations on divulgence (§ 3371) and exact time limitations (§ 3370) on the use of the information filed under the challenged statutes. Since the filing requirements pertain only to the names and addresses of patients without even mentioning the malady for which the drug is being prescribed, the assertion of intrusion into the individual's privacy is insincere but in any event is at most, *de minimis.* The statutory requirements of confidentiality more than effect any potential risk that any individual's asserted privacy might be violated or that there will be a "broadcast to unauthorized sources" with resulting stigmatization. It is obvious that these are "articulated fears" (*Buckley* v. *Valeo,* 46 L. Ed. 2d, at 715), without substance.

By affirming the three-judge court opinion in *Association of American Physicians & Surgeons* v. *Mathews,* —— U.S. ——, 46 L. Ed. 2d 299, 96 S. Ct. 388, this Court indicated that government regulation to achieve a legitimate State purpose will not be held to violate any individual's right of privacy when these are adequate safeguards of confidentiality. The three-judge court opinion in *Association of American Physicians & Surgeons* v. *Weinberger,* 395 F. Supp. 125, 138, had specifically found that there was no interference with the right of privacy because of the

statutory provisions designed to assure confidentiality. This case involved a challenge to the federal Professional Standards Review Law. The confidentiality provisions of that law, 42 U.S.C. § 1320c-15, are no broader and less detailed than the provisions of P.H.L. §§ 3371 and 3370. Like 42 U.S.C. 1320c-15, the New York statute provides criminal penalties for violation of the confidentiality provisions. Public Health Law § 3396(2) provides that:

> "2. Violation of any provision of this article for which a penalty is specifically provided herein shall be punishable as provided herein. Violation of any provision of this article for which no penalty is provided herein shall be punishable as provided in section twelve-b of article one of this chapter or in the penal law."

Public Health Law § 12-b(2) further provides the following penalties:

> "2. A person who wilfully violates any provision of this chapter; or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both."

The court in *Weinberger* distinguished the confidentiality provisions of P.H.L. § 3371, based upon the Court of Appeals opinion in the instant case (480 F. 2d 102). Since the Court of Appeals decision in *Roe,* the New York legislature has amended the confidentiality provisions. They now expanded and more specific provisions are distinguishable from those relied on in *Association of American Physicians & Surgeons* v. *Weinberger* only because the New York statutes now are more carefully drafted, assuring even greater confidentiality. The same reason that caused this Court to affirm the *Weinberger* warrants rejection of a privacy claim, and is persuasive that the District Court's judgment be reversed. That appellees fear the confidentiality provisions may be ineffective is not properly before the Court. Even the liberal approach to standing and case or controversy indicated by *Flast* v. *Cohen,* 392 U.S. 83, a First Amendment case and its progeny, will not justify a fear that a statute may be violated, when there can be no showing that there is either an actual or inevitable abuse of the reporting process. Furthermore, the thirty year history of non-abuse of similar filing requirements in California, Illinois and Idaho, indicates both that appellee's fears are unfounded and that the New York confidentiality provisions are an adequate safeguard of the right of privacy. A claim that state officials will disclose confidential information, when a statute prohibits it is usually treated as frivolous and unrealistic. See *Sanders* v. *Wyman,* 464 F. 2d 488, 491, n. 3 (2d Cir. 1972). *cert. den.* 409 U.S. 991. This is properly the situation here.

B. The purpose and operation of the filing system will not lead to disclosure or stigmatization

The purpose of the challenged statutes must be determined within the contextual purpose of Article 33. Its general purpose is to provide a comprehensive system of regulating dangerous drugs, which are intended for lawful medical purposes, but are frequently unlawfully and carelessly abused thereby presenting an immediate danger to the unsuspecting or unlawful user, as well as a more abstract yet real danger to the general public health, safety and welfare. As part of this comprehensive scheme, the legislature classified dangerous drugs into five schedules. The system of classification is not here under review, the District Court's dismissal of that issue having been affirmed by the Court of Appeals (480 F. 2d 102). The sections of

the Public Health Law here in issue [§§ 3331(6); 3332(2)(a) and 3333(4)] pertain to the use and filing of special triplicate prescription forms for Schedule II drugs. These drugs include various amphetamines, morphine and methadone (narcotic and psychotropic). Here the emphasis is not on controlling street abuse of contraband drugs, but rather on controlling "the growing trends of diversion and legitimate abuse of dangerous drugs"; *Interim Report of the Temporary State Commission to Evaluate the Drug Law,* State of New York, Legislative Document #10 (1972) p. 22. Only by filing and subsequent computerized use of the data on the triplicate prescription form, can the state efficiently regulate the abuse of dangerous, yet medically useful drugs.

There is no reasonable specter of major print-outs correlating patients with particular drugs (87a). Since the prescription form does not require any diagnosis or listing of malady, this imaginary ghost that the appellees envision is clearly beyond the realm of possibility. The programmed use of the computers which utilize patient's names will print-out only instances of potential abuse. Appellee patients contend they are not abusers. Only by filing the patient's name can the serious abuses of going from doctor-to-doctor, over-prescription by the same doctor and forgeries be detected and regulated. Forgers will frequently use the same name, go to different doctors and different pharmacists and thereby be detected only if patient identity is available.

The lower court's language concerning the supposed effectiveness of the filing not only was a novel approach to testing a statute's constitutionality, but was based upon an unfair examination of the filing operation. In every computer system it takes many months before the mechanism is programmed properly and functions efficiently. Because of the protracted litigation in this case, the Department of Health has still been prevented from working out all the

errors in the system, thereby making optimal functioning impossible even at the time of trial. Furthermore, the use of any one month's data is certainly not statistically significant due to expected monthly fluctuations. Extensive preliminary data indicate that use of patients' names and addresses is the only viable method of efficiently spotting drug abuse as manifested by going from doctor-to-doctor, over-precription by one doctor, and forgeries.* To deny the State use of the triplicate drug prescription, including the patient's name and address is to deny the State use of the only efficient means of controlling a significant type of abuse of dangerous drugs. This is particularly paradoxical since the State's right to gather the same information by going from pharmacist to pharmacist as is presently done is not challenged by this action and is presumptively constitutional.

The purpose of the statute is to control drug abuse, not to abuse patients. Computers are to be used consistently with individual freedoms and to protect the individual's and the public's health welfare. Filing and computerization (electronic processing) of names and addresses of patients does not restrict either individual freedoms or the medical decision to prescribe Schedule II drugs. Modern methods of computerization using patient identity (names and addresses) will help control the abuse of dangerous drugs. This abuse can result in severe psychological and physical dependence.

The confidentiality provisions of Public Health Law § 3371 and the time limitations of P.H.L. § 3370 further

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* In a computer run made several months ago of one month's filing, 45 cases of potential abuse were spotted because use of the patient's name and address allowed the computer to identify instances of going from doctor-to-doctor, over-prescription by a single doctor, and possible forgeries and stolen prescription forms where such blank forms had previously been reported by doctors are lost or stolen. *Supra,* pp. 27, 29 (ftn.).

guarantee that any data will be properly used by statutory and ethical requirements of honoring the individual's right of privacy. There is no danger of either disclosure or stigmatization. It is antithetical to the living nature of the Constitution to hold that a legitimate state purpose should be condemned because of the carefully restricted use of modern technology.

This Court has indicated that the state could use efficient means in securing legitimate purposes. In *Rosario* v. *Rockefeller,* 410 U.S. 752, at 762 fn. 10, the Supreme Court said that:

> "We agree with the Court of Appeals [2d Circuit] that '(i)n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means', 458 F. 2d, at 654".

C. The physician-patient relationship is not a *per se* prophylactic of the right of privacy

The physician-patient privilege did not exist in modern common law. Approximately two-thirds of the states have statutorily created some type of physician-patient privilege to protect "those communications which are necessary for obtaining the lengths of the professional relation". 8 J. Wigmore, Evidence § 2383 at 842 (J. McNaughton ed. 1961). At least one-third of the states, and the Federal Rules of Evidence (501) have no physician-patient privilege at all. Most of the states that have created the privilege have qualified the privilege so that it does not always apply. In New York, there is no physician-patient privilege in certain proceedings under the Family Court Act, N.Y. (Judiciary Law), Family Court Act, § 1046(a)vii; there is an affirmative duty to report information indicating that a patient under age sixteen has been a victim of a crime, N.Y. Civil Practice Law and Rules, CPLR 4504(b); to report every case of cancer or other malignant disease, P.H.L. §§ 2401, 2402; to report gunshot wounds and other wounds that may result in death, N.Y. Penal Law § 265.25. In respect to enforcement of Article 33 herein, P.H.L. § 3373 specifically provides that the privilege shall not exist under Article 33. It should be obvious that the physician-patient relationship is not so constitutionally protected so as to dictate that the physician-patient evidentiary privilege be constitutionally mandated. Instead, the determination of whether or not there should be a physician-patient privilege, and when such a privilege should attach, is within the sole discretion of the state legislature as reserved by the Tenth Amendment to the Constitution. *Katz* v. *United States,* 389 U.S. *supra,* at 350-351 (1967).

Whether or not a state should create a physician-patient privilege is not a proper subject of judicial review, *Matter of N.Y.C. Council* v. *Goldwater,* 284 N.Y. 296, 302, 31 N.E. 2d 31, 33 (1940). Nevertheless, the determination of the legislature in excluding the privilege from Article 33, can be readily supported. First, it is unlikely that a person's identity is a communication that originates in confidence. The supposed confidentiality is immediately belied by the necessary communication of the information to the pharmacist. Indeed, the appellees do not question (at least in this action) the state's right to go through pharmacist's files on all prescriptions which entails a broader disclosure than the selective filing of prescriptions of dangerous (Schedule II) drugs. Secondly, even if the communication did originate in confidence, the state's interest in controlling drug abuse must surely outweigh any potential injury to the relationship. The disclosure to the Department of Health is thoroughly protected by the confidentiality safeguards and time limitations of P.H.L. §§ 3371 and 3370. There is no foundation for questioning the legislature's determination that the legitimate state interest in regulating the prescription of dangerous drugs is more compelling

than the marginal value of the physician-patient privilege in the context of prescribing dangerous drugs. Finally, it is unlikely that the filing requirements of the challenged statutes infringe upon the attainment of the benefits of the professional relation. There is some human propensity to disclose our various ailments and the drugs we use for relief. Although Schedule II drugs are uniformly dangerous, use of these drugs is not infrequent.* For instance, demerol is a Schedule II drug which is commonly prescribed and widely discussed. Although appellees raise the specter of stigmatization, they have shown nothing more than an unsubstantiated fear of stigmatization, a fear founded in ignorance as the record herein shows. It is unlikely that an individual who actually requires a Schedule II drug would be dissuaded from taking the drug if the individual understood the purposes and restrictions on use of the filing requirement which the record shows they did not. It is impossible for New York to create a statute that will reflect the individual psyches of eighteen million people. Article 33 represents the legislature's considered judgment of how to maximize the public health, safety and welfare while minimizing the risk of potential injury to the individual by explicitly providing for the confidentiality of the records and by allowing the doctors to make the ultimate decision as to what drug to prescribe for a condition.

From the above, it is evident that the doctor-patient privilege does not and should not apply to Article 33. The statute specifically so provides. P.H.L. § 3373. It is not contended that the doctor-patient privilege is necessarily equivalent with the physician-patient relationship. However, the "privilege" is the only practical manifestation of the relationship. That the "privilege" does not uniformly exist, and exists only within certain boundaries of use, indicates that the "privilege" does not stem from a fundamental relationship. It is difficult to compare the often transitory physician-patient relationship to the sanctity of the marital and family relationships which the Supreme Court has indicated as fundamental. By placing an inappropriate sanctity on the abstract physician-patient relationship, without considering the actual restrictions on the physician-patient privilege, the lower court has focused on an inappropriate concern.

* As witness the over 100,000 filed prescriptions each month. But much is for non-medical purpose. 73 Col. L. Rev., *supra* at 380, fn. 22.

In summary, the opinion of the three-judge court relied heavily on an abstract and unsubstantiated fear of disclosure and consequential stigmatization in concluding that the challenged statutes violated the individual's right of privacy. The court seemed to ignore the restrictions on the privilege which is the sole practical expression of the physician-patient relationship. The court failed to appreciate that the purpose and operation of the statute is antithetical to the mass disclosure and stigmatization which appellees fear. Finally, the lower court failed to take account of the statute's confidentiality provisions which on their face absolutely minimize the risk of an invasion of privacy. These three factors demonstrate that the three-judge court erred in finding that P.H.L. §§ 3331(6), 3332(2)(a) and 3333(4) violated the individual's right of privacy.

VI. The appellees failed to present a real case or controversy and thus lacked standing to maintain the action simply as prescribers and users of dangerous drugs.

While it is not disputed that appellees are patients who receive Schedule II dangerous drugs and doctors who prescribe same, the issue that they purport to present, i.e., that filing of Schedule II prescriptions with appellants violates their constitutional rights is a spurious creation. Simply because they fear misuse or stigmatization, this does not create a "real case or controversy." As an undifferentiated

fear, lacking any specific injury (appellees failed to show any misuse of data as to them or anyone else) the instant action has an "underlying fallacy". As said in *Roe* v. *Ingraham,* 364 F. Supp. 536, 545 (S.D.N.Y. 1973) (three-judge court):

> "*Thom* [306 F. Supp. 1002, affd. 425 F. 2d 1074, *cert. den.,* 398 U.S. 905] emphasizes once again the underlying fallacy of plaintiffs' argument. Any invasion of privacy which occurs under this statute would appear to result from the original insertion of a patient's name on the prescription and its delivery to the pharmacist rather than the centralized collection of these documents".

In other words, centralized collection, as a means of furthering a legitimate state objective, is not an invasion of privacy and thus any challenge to same does not present a real case. Obviously access by appellant's personnel to prescriptions including patient identity is absolutely vital to controlling use of these dangerous drugs. "How" is not really an issue.

Yet in the final opinion of the District Court it was necessary to assume that an undifferentiated "fear" of computerization gave standing or created a real case for the plaintiff patients and doctors to challenge not just computerization but the filing of the triplicate prescriptions themselves. Thus it was stated (J.S. 10a):

> "When these physical illnesses and disabilities require as here treatment by drugs which, in light of the current epidemic of drug abuse in the society, are under governmental control and regulation, there is legitimate concern that information that one, one's children or an intimate is under treatment with such drugs not be broadcast to unauthorized sources. There is fear that the adults or children will be stigmatized if their use of the drug becomes known. There is no question but that the statutory requirement challenged here intrudes upon and interferes with the doctor-patient relationship."

Yet there was absolutely no testimony at trial that the information would or could be "broadcast to unauthorized sources" (§ 3371 prohibits unauthorized disclosure). The opinion could only state the "fear" of stigmatization, *supra.* On the other hand the state effort to control drug abuse and prevent illicit trafficking in dangerous drugs was and is a legitimate state purpose. Despite this the Court concluded that the statute intruded on the doctor-patient relationship and had a needlessly broad sweep. In this regard it had to use the "compelling state interest" test, and expanded it beyond the decisions of this Court, *supra* (II and III). Courts are not to apply the fundamental-interest analysis lightly. *San Antonio Ind. School District* v. *Rodriguez,* 411 U.S. 1, 18, 44 (1973).

Ignored in the opinion is the fact that the law protects confidentiality by limiting strictly the information, as well as the possible uses of that information; P.H.L. § 3371. This negates any invasion of privacy. The decision also ignored the plain legal facts of the original decision. To quote, 357 F. Supp. 1217, at 1221:

> "First, this is not a case where the state has launched a broad scale invasion into the doctor-patient relationship requiring the publication of the entire medical history and treatment record. Indeed, contrary to plaintiffs' suggestion, even the illness for which the Schedule II drug is prescribed need not be revealed.
>
> "Second, the statute *on its face* does not permit unrestricted divulgence of even the limited information collected. In fact § 3371 confines disclosure to the extent consistent with the purpose of the Act. I have also been presented with the memorandum of Assem-

blyman Hardt and the affidavit of Commissioner Whalen, both of whom appear to be taking all necessary steps to maintain the security of the computerized information.

"Finally, this is not a case where the plaintiffs have been able to prove actual abuse of the reporting and computerizing process and consequently to argue facial unconstitutionality based upon pragmatic or historical evidence; that is that such process necessarily and inevitably results in abuse." (emph. suppl.)

Appellees' testimony at trial clearly showed they simply were ignorant of the law's confidentiality provisions (P.H.L. § 3371); and of the five year limitation on records; or the State had ever "broadcast" their records, in any manner. There can be no doubt that the appellee patients were not failing to receive medication due to the statute or any of appellant's action. Clearly the statute infringed no "fundamental interest" or the ability to receive medication.

The appellees were ignorant of the fact that appellant always had access to their prescriptions, even before the passage of the statute involved. Once again the Court ignored this obvious point in the final decision which negates any impermissible invasion of a constitionally-protected right by reason of this statute. The failure to advert to this is anomalous in view of its recognition in the earlier opinion in this case in which the single district judge said in dismissing the complaint (357 F. Supp. 1217, at 1221-1222):

"In order to further appreciate the essence of plaintiffs' privacy argument, it is necessary to consider the status of the law prior to April 1, 1973. Insofar as the issues involved in this lawsuit are concerned, the only effective distinction is that the new statute requires sending a copy of each prescription for Schedule II drugs to Albany to be computerized. Previously

prescriptions required the name of the patient, N.Y. Public Health Law § 3301(32) (McKinney 1971) (repealed 1973), the pharmacist was required to keep a copy of the prescription, *Id.* at § 3322, and law enforcement officials had complete access to the druggists' prescription files, *Id.* at §§ 3322(1)(c), 3334. In short, the state had the power to learn all that it may now require to be revealed. The only difference is that now the state has developed the means to *make effective use* of that basic power which remains unchallenged." (Emphasis supplied) See also *Roe,* 364 F. Supp. at 544.

It was only by ignoring these obvious points that the three-judge court could conclude that the appellees had a real case. It even had to ignore its own prior decision, 364 F. Supp. 536, finding "no evidence of any immediate injury", *id.* at 546, see also 545. The plain fact was that after some 15 months of computerization, at time of trial (December, 1974), no appellee or anyone else, could show any injury from filing or computerization, or appellant's operation thereof.

On the other hand, the decision undercuts the ability to control drug abuse, a fact of life to thousands of people, many of them the recipients of Schedule II drugs, ostensibly for medical purposes. This was a strong factor in the three-judge court originally allowing filing to go forward. 364 F. Supp., at 546:

"It should be noted, however, that the state's efforts are directed against a very real and pressing emergency requiring immediate and effective response."

The decision however ignored this "emergency", what was obviously an immediate and effective plan and appellees' baseless fears were given the force of law. To condemn computerization because of its efficiency strikes at many vital governmental functions and efficiency is not a constitutional vice. *Rosario* v. *Rockefeller, supra.*

As we have pointed out a vague "fear" does not support a cause of action. *Laird* v. *Tatum, supra,* 408 U.S., at 13-14. What makes this an even stronger case than *Laird,* is the fact that the filing and computerization herein is authorized and controlled by a specific statute directed to a specific and real problem. This is not a case of bureaucrats administratively setting up a computer data-bank. Rather the Legislature saw the need for this compilation and passed specific legislation after much study. (See Interim Reports of Temporary State Commission to Evaluate the Drugs Laws).

The "danger" to plaintiffs was and is hypothetical, based on unsupported assertions that the clear provisions of the very law they are challenging would not be observed—as to confidentiality and length of recordkeeping. (P.H.L. §§ 3371 and 3370).*

The decision ignored the testimony that other public officials such as school personnel had records of children taking ritalin, a Schedule II drug. (This drug apparently reduces hyperkenesis, but also has serious side effects) (173a).

Remote claims of risk of disclosure do not support a cause of action. *California Bankers Ass'n.* v. *Schultz,* 416 U.S., at 56-57, *supra.* This case upheld a federal bank recordkeeping and reporting statute against constitutional challenge.

While standing has been expanded by this Court, it is the law that pleadings (and proof) "must be something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP,* 412 U.S. 669, 688 (1973):

> "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency

* The veneer of "expert proof" herein (Wasserman and Rosenberg) bore no relationship to appellees' fears. It cannot repeal P.H.L. §§ 3371 and 3370.

> action, not that he can *imagine* circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." (Emphasis supplied).

The "proof" in the instant case was that the appellees "imagined" harm and took action on such "visions" (123a-124a). Yet with one or two exceptions all received their medication, negating interference with medical practice. Any refusal to accept medication was based on a self-fulfilling prophecy that at some time in the future the data on prescriptions would be misused. It was a personal decision, foisted on patient appellees by appellee doctors who had an irrational antagonism to filing. Such absurd reasoning cannot support a case. Courts do not engage in vacuous speculation that public officials may not observe statutes or regulations as to confidentiality. *Sanders* v. *Wyman, supra,* 464 F. 2d 488, 491, n. 3. Even "fears" as to others do not give standing. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166 (1972).

Certainly *California Bankers Ass'n., supra,* at 68-69, gives no support to conjectural pleading and proof which is all the instant case contains. Testimony that because of "fears", a patient decides not to take a drug hardly supports a claim that filing injured appellees. "Injury in fact" is necessary. This should be specific and distinct. *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208, 216-227 (1974). Appellees have no more interest than anyone else in the actions of appellant, as they assert they are not the targets of the effort to control drug abuses.

The district court struck down an important part of a legitimate state statute on the basis that anonymous patients *might* be harmed by filing *if* the state did not observe the statute (P.H.L. § 3371) as to confidentiality. Also ignored was the five year limitation on keeping of records (P.H.L. § 3370[3]) which obviously shows that no one is

branded for life, or that a child, years later, could have his prescription records revealed. The "fears" which allegedly gave standing or reality to this case, were legally without substance.

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York, May 17, 1976.

Respectfully submitted,

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APPENDIX

New York Public Health Law (P.H.L.) §§ 3331(6), 3332(2)(a), and 3333(4)

There are:

P.H.L. § 3331 (6):

"6. A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New York state prescription in the manner set forth in subdivision two of section thirty-three hundred thirty-two of this article. The practitioner shall retain one copy for five years and shall file the original and one copy with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered. This requirement shall not apply to the dispensing by a practitioner pursuant to section thirty-three hundred fifty-two of this article."

P.H.L. § 3332 (2) (a):

"2. Such prescription shall be prepared in triplicate, written with ink, indelible pencil or, apart from the practitioner's signature, typewriter. The original and both copies must contain the following:

(a) the name, address and age of the ultimate user for whom the substance is intended, or, if the ultimate user is an animal, the species of such animal and the name and address of the owner or person in custody of such animal;"

P.H.L. § 3333 (4):

> "4. The endorsed original prescription shall be retained by the proprietor of the pharmacy for a period of five years. The endorsed copy of such prescription shall be filed with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered."

Other portions of Article 33 of the New York Public Health Law are possibly involved and are set forth at J.S. 20-a to 38-a.